

In The

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Supreme Court of the United States

JOAK, JR., CLERK

October Term 1977

No. 77-451

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN, RENALD ROSSA, JOSEPH CICARDINI, NORMAN HOWARD, UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B. SETTLE, LEO WHITE, DANIEL DUBANIEWICZ, ADOLPH DONADEO, H.J. HUENRICH and FRANCIS KEENAN, all as Trustees ad litem of THE WESTERN PENNSYLVANIA HOTEL, CLUB, MOTEL AND RESTAURANT EMPLOYEES PENSION FUND, and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN, RENALD ROSSA, JOSEPH CICARDINI, NORMAN
(Continued on Reverse)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIRD

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NICHOLAS ALWINE, H.J. HUEMRICH and FRANCIS
KEENAN, all as Trustees ad litem of the WESTERN
PENNSYLVANIA HOTEL, CLUB, MOTEL AND
RESTAURANT EMPLOYEES WELFARE FUND, and/or
SUCCESSOR TO TRUSTEES OF THE HOTEL AND
RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION
237 INSURANCE AND WELFARE TRUST FUND AND
TRUSTEES OF THE HOTEL AND RESTAURANT
EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION
TRUST FUND, . . .

and

HOTEL AND RESTAURANT EMPLOYEES AND
BARTENDERS INTERNATIONAL UNION WELFARE
FUND,

and

INTERNATIONAL UNION PENSION FUND,

Petitioners,

vs.

JOHN J. KENNY,

Respondent.

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HOTEL AND RESTAURANT EMPLOYEES AND
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FUND,

and

INTERNATIONAL UNION PENSION FUND,

Petitioners,

vs.

JOHN J. KENNY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT**

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 23, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Western District of Pennsylvania appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 23, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Kenny's self-dealing constituted a major deviation from the standard of conduct for fiduciaries established by other Courts of Appeals?

2. Whether the decision below conflicts with the standards for the management of Pension Funds created by federal, statutory and case law?

3. Whether Kenny's contract is unenforceable as it is not supported by adequate consideration?

4. Whether Kenny's employment contract ended with the merger of the Local Funds with the International Funds.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

“§186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations,

and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(c) The provisions of this section shall not be applicable

(5) with respect to money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents).

§1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

§1105 Liability for breach of co-fiduciary

Circumstances giving rise to liability

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly, in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

§1106. Prohibited transactions

(b) A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account.”

STATEMENT OF THE CASE

I. Introduction

The instant case is essentially an action for breach of an employment contract.

The action was commenced by filing of summons and complaint against certain of the defendants in the Court of Common Pleas of Allegheny County on December 2, 1974. Defendants, by petition for removal, filed January 8, 1975, removed the case to the United States District Court for the Western District of Pennsylvania. The answer set forth a counterclaim. Subsequently, plaintiff amended his complaint on or about February 13, 1975, May 30, 1975, and October 31, 1975. The principal purpose of the amendments was to clarify the identity of defendants and to add defendants.

On February 20, 1976, the court held a hearing on plaintiff's motion for summary judgment and defendants' cross motion for summary judgment. Both motions were denied. On March 1, 1976, a non-jury trial before Chief District Judge Herbert P. Sorg was begun. The trial continued for three days and was concluded on March 3, 1976. At the conclusion of the trial, the complaint was dismissed as to defendants William Meyers and William Meyers Company, Inc. upon motion of defendants.

By judgment and order dated August 2, 1976, Chief Judge Sorg found defendants liable on the employment contract for part of the damages requested. Defendants respectfully appeal from the findings and conclusions of the District Court.

By judgment and order dated June 23, 1977 the Third Circuit Court of Appeals affirmed the decision of Chief Judge Sorg.

II. Facts

A. THE PARTIES

Plaintiff, John Kenny, was President of the Hotel and Restaurant Employees Alliance, Local 237 (Local 237), a labor union affiliated with the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (International Union) from 1941 through 1973.

Defendants, Hotel and Restaurant Employees Alliance, Local 237 Welfare Fund and the Hotel and Restaurant Employees Alliance Local 237 Pension Fund (cumulatively referred to as the Local 237 Funds) were jointly administered multi-employer, employee benefit trust funds which operated for the benefit of employees of employers which, pursuant to collective bargaining agreements with Local 237, made contributions to said funds on behalf of their employees. Defendants, Western Pennsylvania Hotel, Club, Motel and Restaurant Employees Union Welfare Fund and the Western Pennsylvania Hotel, Club, Motel and Restaurant Employees Union Pension Fund (cumulatively referred to as the Western Pa. Funds) were formed as a result of a merger between the Local 237 Funds and those associated with another local of the International Union — Local 188 — and were jointly administered multi-employer labor-management employee benefit trust funds. The named individual defendants were trustees of the Local 237 Funds or of the Western Pa. Funds.

The Hotel and Restaurant Employees and Bartenders International Union Welfare Fund and the Hotel and Restaurant Employees and Bartenders International Union Pension Fund (cumulatively referred to as the International Funds) are jointly administered multi-employer labor-management employee benefit trust funds. Effective April 1, 1975, the Western Pa. Welfare Fund merged into the International Welfare Fund and the Western Pa. Pension Fund

merged into the International Pension Fund. Consequently, responsibility for administration of the assets and benefit plans of the Western Pa. Funds has been transferred to the trustees of the International Funds. (The principal facts set forth above are contained in a pre-trial stipulation between the parties.)

From the inception of the Local 237 Funds, the plaintiff, John Kenny, served as a trustee and as chairman of the board of trustees. He served as chairman until October 25, 1973, and as a trustee until March 4, 1974. From the beginning, plaintiff acted in the capacity of fund administrator, supervising fund employees, making day to day decisions regarding the operation of the funds and dealing with various third parties such as the funds' actuary, accountant, attorney and insurance company. Until May 1, 1973, plaintiff received no compensation for these services which occupied only a small portion of his time. Through May 1, 1973, plaintiff was paid a salary for his position as Union President which occupied the bulk of his time.

Since 1964, when he was 64 years old, plaintiff has suffered from a number of serious illnesses. In 1967 he required a long term leave of absence of a number of months' duration for health purposes. In 1971 and 1972, plaintiff had two serious heart attacks, each requiring lengthy periods of recuperation. From 1968 the plaintiff regularly told other local union officials of his intention to resign "and turn the Union over to them." From 1968 on, Kenny mentioned to other union officials that "he (Kenny) wanted to take over the Pension and Welfare Funds." Having learned of a written contract between a St. Louis local fund and its director, Kenny had often suggested that someone send for a copy.

B. JOHN KENNY AND THE EMPLOYMENT CONTRACT

At a trustees meeting of the Local 237 Welfare Fund and the Local 237 Pension Fund on July 13, 1971, Kenny was offered employment as Director of the Funds. The resolution of

the trustees did not provide for a salary. The trustees made no offer regarding the terms of such employment and did not request that a written contract of employment be prepared. Nevertheless, at the instance of the plaintiff, the Fund attorney, Herman Lipsitz, drafted a full employment contract with extensive wage and fringe benefit provisions, a term of five years renewal at plaintiff's sole option for another five years and providing that he is not subject to "discharge or removal" unless he so agrees. The original contract provides that Kenny devote his full time and effort to his duties.

As Union President, Kenny had been receiving a salary of \$14,000 per year. By taking over as Director of the Funds he received a salary of \$18,000 per year. The wage increase in the first year of the contract amounted to a 30% increase to Kenny over what he had been earning as Union President.

At the meeting of trustees, on October 21, 1971, the written contract which had been prepared by Fund attorney Lipsitz, was presented to the trustees with the request that they approve same. The trustees did not request or authorize the drafting of the written document; they did not previously make any specific offer, proposal or agreement regarding the terms and conditions of Kenny's employment. There was no arm's length negotiation. There were no private discussions between the Fund attorney and the defendant trustees concerning the employment terms that Kenny would enjoy as Director of Funds. Rather, the record evidence yields the conclusion, that the written contract of employment, upon which plaintiff relies in this action, was wholly and totally a product of the plaintiff and the Fund attorney. Kenny obtained a copy of a contract between Howard McVey and the St. Louis Welfare Funds used it as a model and unilaterally decided what the contract terms would be. In essence, Kenny, as chairman of the trustees alone decided what Kenny, the Fund Director would be earning, and what his terms and conditions of employment would be.

At the next trustees meeting, held March 14, 1972, the only restrictive clause in the contract, that requiring Kenny to devote full time and effort to the funds, was deleted. The resolution adopted at Kenny's request reduced his obligation such that he would now be required to devote only so much time as Kenny himself deemed necessary. The resolution was again reduced to a formal written document by the Fund attorney which was presented at the meeting of the trustees on June 4, 1972 for their signatures.

Apparently to give it greater authority, Kenny's written employment contract was presented to the trustees by attorney Lipsitz as being similar to the St. Louis contract. (The trustees were not specifically told that the contract derived from the St. Louis funds.) The trustees were not however, advised of the many differences. In fact, a comparison between the Kenny and McVey situations yields the conclusion that except for the economic terms, every other aspect of the employment relationship differed. Thus, McVey, the St. Louis fund director, was a local union business agent in 1951 when the St. Louis fund trustees asked him to be Director of the Welfare Fund. He was not then and never has been a trustee. When he accepted the job he resigned his union position. He came to work every day from 9:00 a.m. to 4:00 p.m. with defined duties and responsibilities. He could be discharged by the trustees for misfeasance, malfeasance or nonfeasance. Kenny on the other hand had been Local 237 President and Chairman of Trustees of the Local Funds. Under the final version of the written contract he was not obligated to devote any particular amount of time or effort to his job as Director of the Funds; he could not be fired under the written agreement; he continued to function as Union President for a time after he assumed the fund position and continued as a trustee. Kenny's employment contract failed to establish standards of performance and attempted to emasculate the trustees by divesting them of supervisory authority over the Funds.

The economic terms of the McVey contract constituted compensation for the full time job which McVey performed; Kenny, on the other hand, took the same economic benefits for a part time job that he had previously done without compensation incidental to his principal job of Union President. The Fund job as performed by Kenny over the years required only a minimal effort and he did not intend to do any more upon assuming the Director's position.

As a result of Kenny's concerns regarding the legality of his contract, he did not assume the title of Director of the Funds until May 1, 1973. At that time he stopped receiving salary as Local 237 President although he continued to function as Local 237 President until his resignation on September 7, 1973. As a result of Kenny's actions, during the period May 1, 1973 through September 7, 1973, the Local 237 Funds were giving illegal financial support to Local 237 by paying the salary of its President.

On September 7, 1973, Kenny submitted a letter resigning his position as Union President. The letter, supported by a letter from his cardiologist, indicated that Kenny was too sick to continue his union duties.

C. THE MEYERS STUDY

In late spring of 1973, defendant, Sanfilippo, and another official of Local 237 were at International Union headquarters in Cincinnati to discuss union business with International officials. At that time Sanfilippo made some complaints about how the Local 237 Funds were being run. International President Hanley offered to send an expert on union-management employee benefit trust funds to Pittsburgh to make a study of the Local 237 Funds. The expert, William L. Meyers, went to Pittsburgh shortly thereafter and met with various fund officials including Kenny and with the fund employees.

Meyers thereafter rendered a lengthy report. His findings were presented to a meeting of the trustees on December 13, 1973. Meyers testified at the trial both as an eyewitness and as an expert witness concerning his observations and conclusions with respect to the administration of the Local 237 Funds in 1973 under the leadership of plaintiff Kenny. Contrary to the findings of the District Court, Meyers' testimony consisted of detailed and far reaching criticism of Kenny's administration of the funds; his testimony was not challenged by the plaintiff and stands unrebutted on the record. Meyers' observations and conclusions were reinforced by the testimony of witnesses Virginia Neky, Marie Urban, Louis Sanfilippos and Robert Kern. A summary of Meyers' critical observations of Kenny's administration follows (*each item of criticism of which Meyers testified had been previously set forth in his report and had been reported to the trustees*):

a) The fund investment policy of holding monies in numerous passbook savings accounts (*by 1973 over \$5 million was held in 140 banks around the country*) was dangerous in that security over the money and passbooks was poor and it was improvident since the funds could have been earning higher interest. Meyers testified that the funds may have lost hundreds of thousands of dollars in investment income. Moreover, the passbooks were kept in Virginia Neky's desk drawer with no security. It is impossible to determine whether all passbooks were found when the monies were consolidated by the Pittsburgh National Bank.

b) The fund office was in the same physical location as the union office which caused great confusion and yielded poor administration. Fund personnel were used to perform union duties. See also testimony of Robert Kern and Virginia Neky. Robert Kern testified that while being paid as a full time employee of the Local 237 Funds he was used by Kenny to perform union business agent work for more than 50% of his time.

c) There was very poor document security which makes it very easy for unauthorized people to gain access to and tamper with fund records.

d) There was a defective system for eligibility determination. Due to the condition of records, it was often impossible to make a determination of the eligibility of a claimant without resorting to telephone verification which was not followed up and could not be audited. Employer reports were incomplete and were not promptly posted and balanced. Contributions were not promptly deposited.

e) The Local 237 Funds were used as an instrument of union policy. Claimants who were eligible were denied benefits unless their union dues were paid up while benefits were granted to some union members who were not eligible. These instructions would come either directly from Kenny or from someone acting on Kenny's behalf. Eligibility rules which were made by trustees were sometimes disregarded by Kenny who would decide to pay a claim or refuse to pay for personal or union reasons.

f) Procedures for collection of money owed to the funds by contributing employers were inadequate since the fund administration did not know whether and to what extent an employer was delinquent. In addition, employer contributions were never audited and therefore employers were not held accountable for failing to make contributions for all employees.

g) There was comingling of monies between Pension Fund and Welfare Fund such that it was difficult to determine where certain assets belonged.

Meyer concluded that the Local 237 Fund office under Kenny was among the worst he had ever seen.

Virginia Neky, who had managed the Local 237 Pension

Fund under Kenny's administration testified that some employers did not render reports to the funds and that Kenny did nothing to get the reports. During the period April, 1973 to April, 1974, Kenny came to the office infrequently and then only in the mid to late afternoon. When he did come to the office, the majority of his time was spent on union rather than fund business. Although Virginia Neky was a Local 237 Pension Fund employee, she did union work as well.

The assets of the Local 237 Pension Fund were held in over 100 passbook savings accounts and the passbooks were kept in her desk drawer despite the fact that several passbooks were known to have been lost in 1964 or 1965 and the office was in a state of confusion.

Marie Urban, who had been a Local 237 Welfare Fund employee under Kenny's administration testified that one of her jobs was to check whether the dues of a benefit applicant were paid up before the claim would be paid.

Kenny authorized payment of claims for union members who were not eligible for benefits. During the last year (*i.e.*, while he was the paid Director of the Funds) Kenny came to the office very infrequently and stayed only for short times.

Witness Louis Sanfilippo, who was a Local 237 business agent under Kenny and who became union president after Kenny resigned, testified that after May, 1973 when Kenny transferred to the Local 237 Fund payroll, he rarely came to the Fund office. Kenny would meet with union officials afternoons at the Carlton House Hotel. These meetings were generally to discuss union business. Trustees learned of Kenny's poor administrative procedure from Meyers, who also gave advice as to how to better operate the funds.

Robert Kern, who had been a Local 237 Welfare Fund employee under Kenny's administration, spent the bulk of his

time doing union business rather than on fund business. He further testified that Kenny gave him his union assignments; Kenny came into the office rarely. During the year May, 1973 to May, 1974, Kern had only five or six conversations with Kenny on fund business although they had many on union business and most of these took place at the Carlton House.

The trustees upon being advised as to how poorly the fund was being administered requested that William Meyers undertake certain administrative responsibilities to correct the problems. The trustees authorized the marshalling of the assets of the funds, retained a bank to act as their agent and obtained professional investment advice. Meyers was instructed to set up a new office, separate from the union office and to institute proper recordkeeping and controls for handling money and claims (see minutes of trustees' meetings).

Although Kenny could have performed duties within this new framework, *he did not*. The record indicates that once Mr. Meyers was retained, Kenny did even less work for the Funds than previously. *Meyers concluded that Kenny was not in evidence and contributed nothing administratively to the Funds.* As a result of Kenny's non-performance on behalf of the Funds, he was discharged and his salary discontinued at a meeting of the trustees of August 19, 1974. Kenny was informed on the following day.

D. THE INTERNATIONAL FUNDS

The International Funds which had been established for the purpose of merging and consolidating local funds of the Hotel & Restaurant Employees and Bartenders International Union accepted the merger of the Western Pa. Funds effective April 1, 1975. The International Funds, at the time of trial were administering benefit plans of 22 local welfare funds and 13 local pension funds; had assets of approximately \$9 million in the welfare fund and \$50 million in the pension fund with

approximately 50,000 participants. There are nine union and nine employer trustees from all over the country. Fund administration is aided by computerized recordkeeping centralized in Chicago while local offices are located in various cities such as Pittsburgh. Fund assets are handled by the Harris Trust and Savings Bank of Chicago which acts as corporate trustee and investment advisor.

REASONS FOR GRANTING THE WRIT

I.

KENNY'S SELF-DEALING CONSTITUTED A MAJOR DEVIATION FROM THE STANDARD OF CONDUCT FOR FIDUCIARIES ESTABLISHED BY OTHER COURTS OF APPEALS.

Approximately 50 years ago, the Honorable Benjamin Cardozo, then Chief Judge of the New York State Court of Appeals set out the standard of behavior for an individual with fiduciary responsibilities. The normal ethics of the business world would not suffice, rather "*A Trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.* As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitions to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions, *Wendt v. Fischer*, 243 N.Y. 439, 444. *Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court.*" (emphasis supplied). *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

In the ensuing years, the courts have clearly and

unequivocally stated that this standard would be maintained. Thus, two years ago, the Second Circuit Court of Appeals stated that trustees would be held to the "highest level of responsibility and care in their management of the trust property." *Morrissey v. Segal*, 526 F.2d 121, 126 (2nd Cir. 1975). See also *Lamb v. Carey*, 498 F.2d 789 (D.C. Cir. 1974), *cert denied*, *Carey v. Davis*, 419 U.S. 869 (1975); *Lewis v. Mill Ridge Coals*, 298 F.2d 552, 558 (6th Cir. 1962).

This high standard places a duty on the trustee to administer a trust "solely in the interest of the beneficiary." *Second Restatement of the Law of Trusts*, §170. The fiduciary or trustee is under "a duty not to profit at the expense of the other . . . If the fiduciary enters into a transaction with the other and . . . if the transaction is unfair to the other, the transaction can be set aside by the other." Comment, *Second Restatement of the Law of Trusts*, §2. See also *Bogert on Trust*, 2d Ed., §543;

These basic principles set a background for an examination of John Kenny's conduct. For years, Kenny was a leader of hotel and restaurant workers in their fight for improved working conditions and wages. Indeed, Kenny was the President of the Hotel and Restaurant Employees Alliance, Local 237 for 30 years.

More importantly, Kenny was the moving force behind the creation of the trust funds at issue. From the onset, he served as Chairman of the Board of Trustees of the Funds. As a practical matter, Kenny ran the operation of the funds in addition to his full time position as Union President.

By 1971, Kenny was interested in another position; a position not yet in existence; that of Director of the Funds. This position he started on May 1, 1973. At that time Kenny was 70 years old and in poor health. In each of the two previous years he had had serious heart attacks requiring lengthy periods of recuperation.

Nevertheless, Kenny wanted a five year term as Director and an option for a second five years at his discretion.

This contract for an already sick and elderly man, provided that he could not be discharged without his approval. The contract specified no hours of employment, no specific tasks to be performed, and no standard to measure the Director's work. All these were within the discretion of the Director himself. It appears that, in fact, Kenny performed no more tasks as the paid Director than he had previously performed without compensation. It should also be noted that Kenny's salary of \$18,000 constituted a \$4,000 raise over his position as Union President.

Thus, the Chairman of the Board of Trustees negotiated a well-paid position for himself requiring no more work than he had previously performed for no compensation and which could not be reviewed by anyone other than himself.

While negotiating this one-sided employment contract, Chairman of the Board of Trustees Kenny was under the duty to act according to the highest moral standards and to refrain from improper self-dealing. Nevertheless, he created for himself a highly paid position which would place no strain on a sick and elderly man. Indeed, Kenny's employment contract could more accurately be described as Kenny's personal pension plan. It can hardly be argued that Kenny did not violate the prohibition on using his fiduciary position as Chairman of the Board of Trustees to benefit himself. See *e.g.*, *Fruehauf's Estate v. CIR*, 427 F.2d 80 (6th Cir. 1970).

As a result, Kenny's conduct raises the question of whether the high standard of behavior previously demanded of fiduciaries is being diluted. It is to the Supreme Court now to answer that question with a resounding no.

II.

THE DECISION BELOW CONFLICTS WITH THE STANDARDS FOR THE MANAGEMENT OF PENSION FUNDS CREATED BY FEDERAL STATUTORY AND CASE LAW.

As discussed previously, Kenny arranged for himself an extraordinarily favorable contract. He negotiated this contract while Chairman of the Board of Trustees of the Pension Funds.

This conduct did not just violate the general standard required of fiduciaries. His self-dealing violated specific prohibitions established by statute and case law.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1104(a)(1) requires a fiduciary discharge his duties "solely in the interest of the participants and beneficiaries and. . . (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims."

Unless it can be said that a prudent Chairman of the Board of Trustees of a pension and welfare fund would hire as Director of those funds a sick, elderly man with a renewable five year contract which left the performance standards completely within the employee's discretion, then the Chairman violated his statutory obligations when he hired himself as Director.

Similarly, Section 1106(b) of the Act states that a fiduciary shall not: "(i) deal with the assets of the plan in his own interest or for his own account."

Yet, here, the fiduciary Kenny arranged for the plan to hire him at terms which could only be characterized as in Kenny's own interest and for Kenny's own account.

And Section 1105 makes the other trustees responsible for remedying Kenny's breach of his fiduciary responsibilities.

Kenny's clear violations of the provisions of ERISA would make his contract void on January 1, 1975 when the Act became effective.

In addition, the Taft-Hartley Act limits the use of employee trust funds to the "exclusive benefits of the employees of such employer, and their families and dependents." 29 U.S.C. §186(c)(5). Thus, use of trust funds for the benefit of the union has been specifically prohibited. See *United States v. Saniago*, 528 F.2d 1130 (2nd Cir. 1976), *cert. denied*, 96 S. Ct. 2169 (1976); *Poston v. Caraken*, 378 F.2d 439 (5th Cir. 1967). Indeed one court required separation of the union and trust fund officers, facilities, and so on. *American Bakeries v. Barrick*, 162 F. Supp. 882 (N.D. Ohio 1958), *aff'd.*, 285 F.2d 426 (6th Cir. 1960).

Here, however, the fund and union offices were in the same location. More importantly, Kenny during the period he was paid as a full-time Director of the trust funds, the bulk of the limited time he was actually in the office was spent on union business. Two other employees of the Pension Fund, Virginia Neky and Robert Kern, performed union business under the direction of Kenny. This conduct clearly constituted violations of governing law and placed an affirmative obligation on the other trustees to remove Kenny.

Finally, in a case where the United States Government held monies in trust for certain Indian tribes, the Court of Claims held that the government violated its fiduciary obligations by failing to invest the monies in the highest paying prudent investment available. *Cheyenne Arapaho Tribes of Oklahoma v. United States*, 512 Fed. 1390, 1395 (Ct. of Clms. 1975). The trust funds managed by Kenny were scattered in banks throughout the country. Aside from the possibility of losing track of some of

these funds, this practice also resulted in lower interest payments than would have been possible if the funds were consolidated. Once again, Kenny was clearly breaching his obligations as a fiduciary and as Director.

The apparent failure by the District Court and the Court of Appeals in the instant case to recognize Kenny's serious and continual breaches of his fiduciary responsibilities constitutes a major departure from the exacting standards applied to other fiduciaries by the other Circuit Courts of Appeals. This departure by the Third Circuit raises serious questions as to the continuing viability of previous decisions concerning a trustee's responsibilities. It is the Supreme Court which should now establish the standard of behavior required by ERISA.

III.

KENNY'S CONTRACT IS UNENFORCEABLE AS IT IS NOT SUPPORTED BY ADEQUATE CONSIDERATION.

It is a basic principle of contract law that a contract, to be enforceable, must be supported by consideration. See *Byerby v. Duke Power Co.*, 217 F.2d 803 (4th Cir. 1959); *Abbott v. Arkansas Utilities Co.*, 165 F.2d 339 (8th Cir. 1948). —

The consideration flowing from the trust funds is clear: \$18,000 a year for 5 years, an option to renew, \$16,500 severance pay and a variety of valuable fringe benefits. Not so clear, however, is the consideration flowing from Kenny. He did not promise to work any specified number of hours, he did not promise to perform any specific tasks, he did not promise to be held to any standard of conduct. In short, he could come and go as he pleased, and do as he pleased. It should be noted that the proposed contract required Kenny to devote his full time and effort to his position as Director. This was changed to require him to devote as much time as Kenny himself considered necessary. Thus, Kenny could have decided that it was not

necessary for him to devote any time to his position; Kenny could literally have never showed up as Director and have complied with the requirements of his contract. Nor could anyone have challenged a decision by Kenny not to perform any services. His performance was not subject to any standard of review. The contract specifically provided that Kenny could not be discharged unless Kenny himself agreed to the discharge.

Thus, Kenny promised to do no more than he wanted to do. This included the right to do absolutely nothing for the trust funds. A party to a contract who has not obligated himself to do anything has simply not rendered any consideration. *TMA Fund Inc. v. Biever*, 380 F. Supp. 1248 (E.D. Pa. 1974), *appeal dismissed*, 520 F.2d 639 (3 Cir. 1975).

Further, it appears that Kenny's part of the contract may not even constitute a promise. According to the Comment (b) to Section 2 of the *Restatement of the Law of Contracts*, "an apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise, although often called an illusory promise." See also §79 of the *Restatement of the Law of Contracts*.

Nor could Kenny's conduct constitute consideration. Kenny rarely went to the trust office. On those occasions he apparently stayed only a short time and even then, most of his time was spent on union business and not on the administration of the Fund. This lack of direction resulted in a very poorly run Fund. The Fund lost hundreds of thousands of dollars in possible earnings because it had its money scattered in small bank accounts all over the country. Security over the passbooks was virtually nonexistent. It is not possible to determine whether the Fund was subsequently able to recover all those monies or whether there are additional accounts from which the monies were lost or stolen. Inadequate efforts were made to determine whether employer contributions were complete and up to date.

Funds were used to further union policies. This misuse included the improper determinations of benefit eligibility and the improper use of Fund employees to perform union business.

In sum, it appears that Kenny did no more than he promised to do: nothing.

Perhaps the best indication of the lack of consideration flowing from Kenny is to ask what conduct or lack of conduct by Kenny would have constituted a breach of his illusory promise.

IV.

KENNY'S EMPLOYMENT CONTRACT ENDED WITH THE MERGER OF THE LOCAL FUNDS WITH THE INTERNATIONAL FUNDS.

Effective April 1, 1975 the Local 237 Funds merged into the Welfare and Pension Funds of the International Union. The District Court found the transfer was proper and conducted in the interest of the beneficiaries of the Fund.

The International Union had no contract with Kenny. There is no successorship clause in Kenny's contract. As a result, Kenny's rights, if any, ended with the merger of the Funds. There is no basis to find a continuity of enterprise in the Funds.

This Court has recognized the difficulty of resolving successorship problems in contrasts. As a result, the principles have been developed on a case by case basis.

This much is clear, however: a new employer has the right to hire former employees. This was established in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and reaffirmed in *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974).

Nor is *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543 (1964) to the contrary. *Wiley* simply provides for the successorship of an arbitration clause.

Since the trustees of the International Funds would have had a right to discharge Kenny had he still been employed at the time of the merger on April 1, 1975, Kenny's damages, if any, must be cut off at that date.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

s/ Robert J. Mozer
MOZER & GULMI, P.C.
Attorney for Petitioners

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APPENDIX

OPINION OF COURT OF APPEALS

**UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT**

NOS. 76-2475 and 76-2476

JOHN J. KENNY,

Appellant in No. 76-2475

v.

**LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN
HOWARD, UMBERTO GUIDOTTI, ARTHUR
TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B.
SETTLE, LEO WHITE, DANIEL DUBANEWICZ, ADOLPH
DONADEO, H.J. HUEMRICH and FRANCIS KEENAN, all
as Trustees ad litem of THE WESTERN PENNSYLVANIA
HOTEL, CLUB, MOTEL AND RESTAURANT
EMPLOYEES PENSION FUND, and/or SUCCESSOR TO
TRUSTEES OF THE HOTEL AND RESTAURANT
EMPLOYEES ALLIANCE LOCAL UNION 237
INSURANCE AND WELFARE TRUST FUND AND
TRUSTEES OF THE HOTEL AND RESTAURANT
EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION
TRUST FUND,**

and

**LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN
HOWARD, UMBERTO GUIDOTTO, ARTHUR
TATANGELO, GORDON FLAGG, FRANK GLANDI, W.B.**

Opinion of the Court of Appeals

SETTLE, LEO WHITE, DANIEL DUBANEIWICZ, NICHOLAS ALWINE, H.J. HUMERICK and FRANCIS KEENAN, all as Trustees ad litem of the WESTERN PENNSYLVANIA HOTEL, CLUB, MOTEL AND RESTAURANT EMPLOYEES WELFARE FUND, (and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND AND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION TRUST FUND),

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION WELFARE FUND, AND WILLIAM L. MEYERS,

and

INTERNATIONAL UNION PENSION FUND,
Louis Sanfilippo, et al., Appellants in No. 76-2476

*On Appeal from the United States District Court for the
Western District of Pennsylvania*

Civil No. 75-40

Argued June 14, 1977

Before: ADAMS, VAN DUSEN and GIBBONS; *Circuit Judges.*

After consideration of the contentions raised by appellant,
it is

Opinion of the Court of Appeals

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

BY THE COURT,

s/A.M. Adams
Circuit Judge

ATTEST:

s/Thomas F. Quinn
Thomas F. Quinn
Clerk

DATED: June 23, 1977

OPINION OF DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA**

JOHN J. KENNY,

Plaintiff,

v.

**LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN
HOWARD, UMBERTO GUIDOTTI, ARTHUR
TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B.
SETTLE, LEO WHITE, DANIEL DUBANIEWICZ,
ADOLPH DONADEO, H.J. HUENRICH and FRANCIS
KEENAN, all as Trustees ad litem of THE WESTERN
PENNSYLVANIA HOTEL, CLUB, MOTEL AND
RESTAURANT EMPLOYEES PENSION FUND, and/or**

Opinion of District Court

SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN, RENALD ROSSA, JOSEPH CICARDINI, NORMAN HOWARD, UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B. SETTLE, LEO WHITE, DANIEL DUBANIEWICZ, NICHOLAS ALWINE, H.J. HUENRICH and FRANCIS KEENAN, all as Trustees ad litem of the WESTERN PENNSYLVANIA HOTEL, CLUB, MOTEL AND RESTAURANT EMPLOYEES WELFARE FUND, and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND AND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION WELFARE FUND,

and

INTERNATIONAL UNION PENSION FUND,

Defendants,

Civil Action No. 75-40

Opinion of District Court

The above entitled action, tried to this court without a jury, was commenced by the plaintiff, John J. Kenny, in the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, to recover damages for the wrongful termination by the defendants of his employment as Chairman of the Board of Trustees and Director of the Hotel and Restaurant Employees Alliance Local Union 237 Pension Trust Fund and Welfare Trust Fund (Local 237 Trust Funds), which funds were accumulated largely through the efforts of Mr. Kenny as President of Local 237.

The defendants, trustees of the Western Pennsylvania Hotel, Club, Motel and Restaurant Employees Pension Fund and Welfare Fund (Western Pennsylvania Trust Funds) and the Hotel and Restaurant Employees and Bartenders International Union Pension Fund and Welfare Fund (International Trust Funds), removed the action to this court pursuant to 28 U.S.C.A. §1441(a)¹ and 29 U.S.C.A. §1001 *et seq.*,² applicable to employee welfare and pension benefit plans, and asserted a counterclaim for compensation paid to the plaintiff between May 1, 1973 and August 31, 1974.

1. 28 U.S.C.A. §1441(a) provides:

"... any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

2. 29 U.S.C.A. §1132(e)(1) provides:

"... the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary."

Opinion of District Court

FINDINGS OF FACT

From the inception of the Local 237 Trust Funds, two funds administered by boards of trustees of identical composition, John J. Kenny acted as unsalaried chairman of both boards of trustees in addition to performing his duties as President of Local 237, an elected post for which he received compensation.

Pursuant to declaration of trust,³ on October 21, 1971; the trustees of the Local 237 Trust Funds signed a formal contract of employment which named John J. Kenny as Chairman of the Board of Trustees and Director of the Local 237 Trust Funds. On May 1, 1973, Mr. Kenny accepted the terms of the contract as amended June 14, 1972, agreeing to devote whatever time he felt was necessary in the performance of his duties and accepting compensation of \$18,000.00 per year, subject to a yearly increase of ten percent during the term of the contract or any renewal thereof. The trustees agreed to reimburse Mr. Kenny for expenses incurred in supervising the Funds and in operating the automobile with which he was to be provided.

Under the terms of the contract, Mr. Kenny was not subject to discharge and, upon termination of his employment, was entitled to severance pay in the amount of \$16,500.00. The contract could be renewed at his option for an additional five years under the same terms and conditions.

3. The Agreement and Declaration of Trust of the Local 237 Trust Funds, as amended, provided:

"Section 5. — Compensation —

No Trustee shall receive any compensation for the services rendered by him as Trustee. However, in those instances wherein the Trustee is also designated to act in a dual capacity as Director of the Fund, compensation shall be permitted to be paid to said Trustee in the capacity as Director.

Opinion of District Court

After May 1, 1973, Mr. Kenny did not receive compensation as President of Local 237 and, on September 7, 1973, he resigned that position.

In September, 1973, William L. Meyers Co., with the approval of the trustees, conducted a study of the administration of the Local 237 Trust Funds and submitted a report, dated October 5, 1973, which contained suggestions for the Funds' improved efficiency. Mr. Meyers found no improprieties in the administration of the Trust Funds.

In March, 1974, Local 237 merged with the Bartenders Local Union 188 to form Local 57 Western Pennsylvania Hotel, Club, Motel and Restaurant Employees and Bartenders Union, and direction and control of the assets of the Local 237 Trust Funds were transferred to the trustees of the Western Pennsylvania Trust Funds. On March 7, 1974, the trustees voted to remove Mr. Kenny from the board of trustees and to hire William L. Meyers Co. as administrator of the Trust Funds. Mr. Kenny continued to receive his salary as Director of the newly-named Trust Funds until August 19, 1974, when the trustees voted to discontinue his salary. During his employment, Mr. Kenny received \$24,600.00 under the terms of the contract and continues to have possession and use of an automobile owned by the Trust Funds.

On April 1, 1975, the Western Pennsylvania Trust Funds were merged with the International Trust Funds. There is no evidence that the transfer of the funds was made for any purpose other than to discharge the fiduciary duty of the trustees to administer the Trust Funds in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence required by statute.⁴

Although the defendants contend that Mr. Kenny was

4. 29 U.S.C.A. §1104

Opinion of District Court

unwilling or unable to perform his duties as Director of the Trust Funds and that he was therefore terminated for just cause, the report of the study conducted by the William L. Meyers Co. does not establish that Mr. Kenny's performance was unsatisfactory. Mr. Meyers further dispelled any such inference by his testimony that the recommended improvements could have been implemented under Mr. Kenny's administration.

That the court finds no evidence to support the contention that Mr. Kenny used improper means to secure the contract or that the compensation provided in exchange for his services was not reasonable.

CONCLUSIONS OF LAW

The court has jurisdiction over the persons and subject matter of this action pursuant to 28 U.S.C.A. §1441(a).

The contract of employment providing compensation to Mr. Kenny for his services as Director of the Funds violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. §1001 *et seq.* Nor does the evidence disclose just cause for the discontinuance of Mr. Kenny's salary or for the unilateral rescission of his employment contract. The subsequent transfer of the Trust Funds does not cure the breach.

The measure of damages recoverable by an employee for the breach of an employment contract for a specific term is:

“ . . . the amount of his salary for the unexpired term less any sums which he has earned following his discharge and which he may thereafter earn during the unexpired term of the contract.”

Russell v. Barnes Foundation, 52 F. Supp. 827, 830 (E.D. Pa. 1943), *aff'd* 143 F.2d 871 (3d Cir.), *cert. denied* 323 U.S. 771

Opinion of District Court

(1944), citing *Pierce v. Tennessee Coal, Iron and Railroad Company*, 173 U.S. 1 (1899).

In view of Mr. Kenny's limited formal education (four years of elementary school), his 73 years of age, and the fact that he has sustained two severe heart attacks in recent years, (Tr. 97-100), it is not likely that he would find employment elsewhere. It is therefore concluded that, as to the first five-year period of the contract, Mr. Kenny may recover \$128,290.30, the sum of the following: \$67,468.00, the compensation which he would have received to date, and \$16,500.00, severance pay under the terms of the contract, plus \$44,322.30, compensation for the remaining twenty-one months of the five-year term. Future losses are not reduced to present worth because it is believed that the differential is off-set by non-inclusion of interest on plaintiff's losses to date.

The above considerations, in addition to those contained in Mr. Kenny's motion for advancement of the trial date,⁵ lead this court to conclude that it is not probable that Mr. Kenny would have exercised his option to renew the contract for an additional five-year term.

The defendants' counterclaim for salary paid under the terms of the contract until May, 1973, will be denied.

An appropriate Order will be entered.

s/ Herbert P. Sorg

C.D.J.

Dated: August 2, 1976

5. The plaintiff's Motion to Advance Trial, granted on January 1, 1976, set forth the following:

7. Plaintiff is 74 years of age, is suffering from hypertension and heart ailment necessitating constant cardiological care and requiring that he avoid stress. Delay in the within trial may aggravate his ailments, as counsel for plaintiff is advised by Dr. Julian Levinson, plaintiff's physician.